

LAW OFFICES

SHOOK, HARDY & BACON

REPORT ON RECENT ETS
AND IAQ DEVELOPMENTS

September 10, 1993

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IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

[1] ETS Risk Assessment Litigation: Amici Seek Leave to File Memorandum in Support of EPA

Several public health organizations have sought leave to file a memorandum as amici curiae in support of the EPA's motion to dismiss the lawsuit challenging the validity of the EPA Risk Assessment on ETS. The proposed memorandum essentially urges the court to rule that the complaint is not reviewable under the Administrative Procedure Act (APA). The organizations filing the motion are the American Lung Association, American Heart Association, American Cancer Society, American Public Health Association and Public Citizen.

The interests to be advanced by the organizations are stated as: (i) "an interest in seeing that the public has access to scientific data about the hazards posed by smoking. . . ." and (ii) "an interest in seeing that government agencies can issue scientific reports on public health issues without being subjected to lawsuits seeking to invalidate scientific conclusions on health hazards."

As a preliminary matter, the memorandum which the amici propose to file seeks to direct the court's attention to the parts of the ETS risk assessment dealing with purported health effects of ETS on children. Amici argue that these parts of the risk assessment would not be affected by the plaintiffs' challenge to the cancer studies on which the risk assessment is based. Amici also survey other government reports about ETS and outline the steps taken by the EPA in issuing the risk assessment.

Amici argue that the risk assessment was not issued as part of any regulatory proceeding to limit ETS exposure and that the risk assessment does not impose any

direct obligations or limitations on any of the plaintiffs. Amici characterize the risk assessment as simply one of many scientific reports issued by government agencies each year on the degree of risk posed by various substances or conditions, and argue that "the APA does not let disgruntled parties use federal courts as a vehicle to attack the issuance of government reports that impose no regulatory obligation." Amici also argue that the risk assessment, which they characterize as a mere report, does not constitute final agency action reviewable by the court.

According to the amici memorandum, the risk assessment "*understates* the health risks posed by ETS" and "broke no new scientific ground." (Emphasis in original.) In this regard, amici argue that it is unlikely the plaintiffs will be able to prove that a favorable ruling by the court would reverse any of the actions taken by government and private entities to ban smoking.

The response of the tobacco industry plaintiffs to the EPA's motion to dismiss is due on September 20, 1993. *Flue-Cured Tobacco Cooperative Stabilization Corporation, et al., v. EPA*, No. 6:93CV370 (U.S. District Court, Middle District, North Carolina) (filed June 22, 1993).

103D CONGRESS

[2] Passage of Federal Building Smoking Restrictions Unlikely

According to a press report, a number of Congressmen are predicting that Senator Frank Lautenberg's (D-N.J.) PRO-FEDS legislation, which was added in the Senate to a House appropriations bill (H.R. 2403), will be removed from the bill in conference. The chair of the House Appropriations Committee, William Natcher (D-Ky.), is said to oppose the smoking restriction amendment and to wield considerable influence over what the negotiators will decide in the conference committee. The amendment would restrict smoking in federal buildings to areas with separate ventilation.

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During debate on the PRO-FEDS measure in the Senate, Senators Wendell Ford (D-Ky.) and Mitch McConnell (R-Ky.) criticized the EPA Risk Assessment on ETS, and McConnell argued that there is "insufficient science or logic to justify" adopting legislation that would severely restrict smoking in federal buildings. Senator Ford argued before the Senate that indoor air quality should not be addressed on a product-by-product basis.

According to an aide for Representative James Traficant (D-Ohio), who has also introduced legislation to restrict smoking in federal buildings (H.R. 881), Representative Natcher will likely prevail during conference negotiations. See *Star Tribune*, August 29, 1993.

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

[3] ASH to Provide OSHA Complaint Forms

In the current issue of the Action on Smoking and Health (ASH) publication *Smoking and Health Review*, ASH advises readers that it will soon have "official OSHA complaint forms" available to its supporters so they may file anonymous complaints with the agency about workplace smoking. ASH says complaints filed with OSHA may "help persuade OSHA to issue an across-the-board rule banning smoking in the workplace." ASH asserts that in complaints filed with OSHA, as opposed to ones filed under the Americans with Disabilities Act, the complaining party is not required to claim a "special sensitivity to tobacco smoke," and that this process "is part of an escalating ASH offensive to persuade OSHA to protect workers from the established dangers of ETS." See *Smoking and Health Review*, July-August 1993.

WHITE HOUSE

[4] Administration Nearing Agreement on Smoking Ban on International Flights; ASH Sends Letters to U.S. Airlines and Corporations

The Clinton administration reportedly is hoping to conclude within months agreements with Australia, New Zealand and Canada to ban smoking on international flights involving these countries. Similar negotiations are under way with other countries, reportedly

with a goal of smoke-free flights worldwide by 1996. See issue 50 of this Report, June 25, 1993.

Last fall, a world airline no-smoking policy was negotiated by the International Civil Aviation Organization, a branch of the United Nations. However, since that policy does not include enforcement provisions, separate international smoking policy agreements must be negotiated. See *USA Today*, September 3, 1993.

Meanwhile, Action on Smoking and Health (ASH) says it has sent, by certified mail, letters to U.S. airlines asking that they voluntarily prohibit the seating of children in smoking sections on international flights. ASH says that if the airlines do not comply, it will petition the U.S. Department of Transportation to adopt such a rule. The letter apparently placed an emphasis on the contained in the EPA Risk Assessment on ETS. See *ASH Smoking and Health Review*, July-August 1993.

U.S. FEDERAL TRADE COMMISSION (FTC)

[5] FTC Approves Air Cleaner Measurement System

The FTC, after studying the issue for 11 years, has reportedly approved a rating system that measures the effectiveness of air cleaner removal of ETS according to room size. The "clean-air delivery rating" (CADR) is a measure of the quantity of clean air produced by an air cleaner unit in a cubic-foot per-minute calculation. Separate numbers are used to evaluate pollen, dust and ETS removal, but only the ETS removal was reportedly approved by the FTC.

The new ratings, which will appear on seals applied to the air cleaners of participating manufacturers beginning January 1, 1994, will show the maximum air cleaning effect for ETS in a room of a specified size. The new system was evidently designed to give consumers a way to evaluate the efficiency of air cleaning units. While some manufacturers are apparently enthusiastic about the new ratings, others, critical of the fact that the test procedures were developed by a for-profit corporation, are taking issue with the standards. See *HFD -- The Weekly Home Furnishings Newspaper*, August 9, 1993.

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ASHRAE

[6] Meetings Scheduled on Ventilation Standard

ASHRAE has scheduled a series of meetings on the revision of its Ventilation Standard 62-1989 for November 5-7, 1993, in Philadelphia, Pennsylvania. The meetings are open to Standing Standards Project Committee 62 (SSPC 62) members who are revising the standard and to "persons directly and materially affected by the applicable requirements of Standard 62-1989, as space allows." Further information on the meetings can be obtained from William Gene Tucker, Chairman of SSPC 62, or ASHRAE Headquarters, Standards Section, (404) 636-8400.

STATE AND LOCAL GOVERNMENTS

[7] Court Orders Los Angeles Clerk to Verify Signatures

On September 2, 1993, Superior Court Judge Robert O'Brien reportedly gave the Los Angeles City Clerk until October 4, 1993, to verify all 97,572 signatures collected by opponents of the city's restaurant smoking ban. *See* issue 53 of this Report, August 6, 1993. Meanwhile, city officials continue to predict that the petition drive will fall short of the 58,275 valid signatures required to place the matter on the ballot.

In early August, the city clerk had invalidated the petition drive, based in part on a requirement that petitions be circulated only by registered city voters. Judge O'Brien ruled that the requirement was unconstitutional. Thereafter, city officials recounted a random sample of signatures and reported that 55 percent of the signatures were valid, triggering the judge's order to verify all of the signatures.

Meanwhile, the smoking ban remains in effect. Judge O'Brien has said that, if the requisite number of signatures are verified, he has not ruled out the possibility of placing the matter on the November ballot. *See Los Angeles Times*, September 3, 1993.

[8] ETS-Related State and Local Legislation**• California**

The California legislature, set to adjourn on September 10, 1993, has failed to take any further action on A.B.

13. The bill reportedly stalled in the state Senate Judiciary Committee. The measure would have banned smoking in all workplaces, restaurants, malls, hotels, airports and other public places. *See* issue 51 of this Report, July 9, 1993, Appendix B.

On August 31, 1993, the bill did not come to a vote amid reportedly clear indications that it would be defeated. The committee reportedly urged Terry Friedman (D-Encino), the bill's sponsor, to return next year for a vote. The committee chair was reported to say the measure was too broad and needed further amendments. The legislature is set to begin its next session in January 1994. *See Los Angeles Times*, September 1, 1993 and *Sacramento Bee*, September 1, 1993.

On September 1, 1993, the state Assembly approved A.B. 291 and sent it to Governor Pete Wilson (R) where it now awaits his signature. Introduced by Assemblywoman Jackie Speier (D-Burlingame), the bill prohibits smoking in all state-owned and state-leased facilities, including the Capitol and all legislative offices. The measure also bars smoking within five feet of all state building entrances and within state-owned vehicles, including police cars. *See Sacramento Bee*, September 1, 1993.

A.B. 615 has been sent to the Governor for his signature. The bill prohibits smoking on the premises of child day care centers, including private residences licensed as family day care homes during hours of operation. *See* A.B. 615, Regular Session (1993-94).

On August 23, 1993, A.C.R. 58 was defeated in the Assembly. The resolution would have required that smoking be allowed in stairwells and in designated portions of the cafeteria in the State Capitol building annex. *See* A.C.R. 58, Regular Session (1993-94).

• Local Governments in California

Agoura Hills. According to a news report, on August 25, 1993, the city council approved an ordinance prohibiting smoking in restaurants. There was no opposition. *See Los Angeles Times*, August 27, 1993.

Calabasas. The City Council voted 4-1 in favor of an ordinance prohibiting smoking in stores, restaurants and other public places. The council indicated it might seek to include workplaces. Exceptions were made for bars, bars in restaurants, hotel rooms and tobacco stores. Antismoking advocates testified, citing "well-publicized reports on the hazards" of ETS. *See Los Angeles Times*, September 3, 1993.

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Long Beach. Referendum petitions reportedly were submitted on August 27, 1993, calling for a referendum on that city's ordinance banning smoking in restaurants. Enforcement of the ordinance was suspended for verification of signatures. The Long Beach City Council approved the ordinance in late July. See issue 53 of this Report, August 6, 1993.

San Francisco. Supervisor Angela Alioto introduced on August 30, 1993, a resolution to ban smoking in all San Francisco workplaces. The ban would cover interior work areas except hotel rooms and bingo parlors. Candlestick Park would also prohibit smoking. Public testimony was scheduled to be heard on September 8. See *The San Francisco Chronicle*, August 31, 1993.

Santa Clarita. The city council will consider a staff-recommended antismoking ordinance that would restrict smoking in restaurants and workplaces. See *Los Angeles Times*, August 26, 1993.

• Florida

Sixteen Smoke & Snuff tobacco stores, a tobacco wholesaler and a cosmetics store owner are filing an administrative challenge to a state regulation prohibiting smoking in bus and rail stations, malls, airports, and universities, which is scheduled to go into effect October 1, 1993. The opponents argue that the Department of Health and Rehabilitative Services' new rule illegally expands the intent of the 1992 Florida Clean Indoor Air Act, which prohibits smoking in the common areas of public places and workplaces, but doesn't mention shopping malls.

The Department has reportedly said that the effective date of the rule will be postponed until December 1. See *Associated Press*, August 27, 1993, and other press reports.

• Local Governments in Louisiana

At least two government bodies have reacted to a smokers' rights law passed by the Legislature by passing local smoking restriction ordinances before the legislation takes effect. As of September 1, 1993, local governments cannot pass smoking laws more restrictive than the state law, which states that smoking cannot be banned entirely in government offices or some other buildings open to the public.

Jefferson County. On August 25, 1993, the Jefferson Parish Council voted to restrict smoking to people's homes and cars, then suspended the law until January 1,

1995. The Council further exempted restaurants, bars, nightclubs, tobacco stores, and hotels and motels from the law. See *The Times-Picayune*, August 26, 1993.

Slidell. The City Council, on August 24, 1993, passed an ordinance establishing smoking regulations for all the city's municipal buildings except the police department. Mayor Sam Caruso reportedly said he will likely continue the ban on smoking in most buildings, with the possible exception of special events where people rent buildings from the city. See *The Times-Picayune*, August 26, 1993.

• New York

According to a news report, A.B. 4594 was withdrawn pursuant to an agreement between the bill's sponsor, Michael J. Tully, Jr. and the state building management organization. They agreed that further research was needed before the bill could become law.

As introduced on April 22, 1993, the bill would require owners of non-residential buildings with floor space greater than 25,000 sq. ft. to devise and implement operation and maintenance plans for HVAC systems to assure compliance with ASHRAE standards. According to the report, Peter L. DiCapua, president of the Building Owners and Managers Association (BOMA) of New York City said that the bill is faulty in "indicating that there was retroactivity of the maintenance standards" for all buildings throughout the state. Buildings designed before 1989, the year the ASHRAE standards were promulgated, would have to comply with those standards, even if they were designed appropriately and safely. A building might suddenly be "in violation of law" and have to retrofit to meet the 1989 standards. See *Indoor Pollution Law Report*, August 1993.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

- [9] *Blanchard.* Hearing on Motions to Transfer Venue and to Strike to be Held on September 13, 1993

On September 13, 1993, Judge Engelke will convene a hearing on defendants' motions to strike and to transfer venue. In broad terms, the motions contend that the current venue of Galveston County, Texas, is

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improper because plaintiffs' causes of action did not accrue there; that the claims asserted on behalf of the various plaintiffs did not arise out of the same transactions or occurrences; that plaintiffs did not seek leave of the court before filing their supplemental and amended petitions, which added new parties to the case; and that the petitions are improper attempts at forum-shopping.

Three of the 14 plaintiffs in this case presently allege injury from exposure to ETS. Raye Blanchard and Tamara Reed, mother and daughter, both claim damages for unspecified "illness and disease" allegedly resulting from exposure to the ETS from cigarettes smoked by Raye's deceased husband, Thomas, and by Raye herself, who claims she smoked "for about ten years." The third ETS plaintiff, Pamela Kastrin Stephens, claims unspecified "lung and respiratory diseases" allegedly caused by exposure to the ETS from the cigarettes smoked by her deceased father. The named defendants are purported to be the six major U.S. cigarette manufacturers, The Tobacco Institute, the Council for Tobacco Research, and a number of wholesalers and retailers. *Blanchard, et al., v. R.J. Reynolds Tobacco Company, et al.* (District Court, Galveston County, Texas) (filed July 31, 1992).

[10] *Bluitt*: Case Filed in Tyler, Texas

On August 30, 1993, Alfred Bluitt filed suit individually, as representative of the estate of his late wife, and as next friend of his minor children in the U.S. District Court for the Eastern District of Texas, Tyler Division. Mr. Bluitt alleges that his late wife, Willie Ruth Bluitt, was a nonsmoker who died on July 1, 1993, of lung cancer that was purportedly caused by her exposure to "substantial" environmental tobacco smoke "during her employment with Texas Instruments, Inc., and elsewhere during her short lifetime."

Neither the decedent's age nor the length of time she was employed at Texas Instruments is specified in the complaint. Texas Instruments is not named as a defendant in the action. Defendants named in the complaint are R.J. Reynolds; Brown & Williamson; Philip Morris; Liggett Group; Liggett & Myers; American Brands; American Tobacco; Loews Corp. and Lorillard.

Plaintiffs seek \$25,000,000 in actual damages and \$500,000,000 in punitive damages. They are repre-

sented by two attorneys from the Mesquite, Texas, firm of Ted B. Lyon & Associates, P.C., Ted B. Lyon, Jr., and Bill Zook. Neither have been involved in prior tobacco litigation. *Bluitt v. R.J. Reynolds Tobacco Company, et al.* (U.S. District Court, Eastern District of Texas, Tyler Division) (filed August 30, 1993).

[11] *Butler*: Hearing on Plaintiffs' Motion for Protective Order Scheduled to be Held on September 10, 1993

As of this writing, Judge Gibbs was scheduled to hear oral argument on September 10, 1993, on plaintiffs' motion for protective order regarding defendants' deposition notice for plaintiff Ava Dean Butler.

In this case plaintiffs contend that Burl Butler, a Laurel, Mississippi, barber, developed lung cancer as a result of his exposure to environmental tobacco smoke. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

[12] *Chustz*: Case Filed in Louisiana

R.J. Reynolds and American Tobacco are the only defendants named in a case filed by attorney George Covert on August 13, 1993, in the U.S. District Court in Louisiana. Plaintiffs are the surviving spouse and heirs of Charles Chustz, a smoker who allegedly died of lung cancer on January 24, 1993.

Plaintiffs contend that during the time period of 1942-1991, Mr. Chustz "smoked and was exposed to environmental tobacco smoke from cigarettes manufactured by defendants." Plaintiffs seek unspecified dollar amounts in actual damages, damages for wrongful death and for loss of consortium, and \$75,000 in special damages. Mr. Covert is being assisted in the case by Baton Rouge attorney James Piker. *Chustz v. R.J. Reynolds Tobacco Company, et al.* (U.S. District Court, Middle District, Louisiana) (filed August 13, 1993).

[13] *McKinney*: Nevada Supreme Court Dismisses Plaintiff's Appeal

On August 26, 1993, the Nevada Supreme Court dismissed plaintiff's appeal, holding that plaintiff's complaint failed to state a claim for relief under 42 U.S.C. § 1983 and that plaintiff had no private cause

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of action under the Nevada Constitution against the defendants. The order was issued before the defendants submitted their brief in opposition to plaintiff's brief.

Plaintiff William McKinney, who is incarcerated in a Nevada jail, contended R.J. Reynolds and Brown & Williamson failed to warn of the health effects of ETS exposure. He alleged he has fairly general health problems caused by his exposure to ETS (emotional pain, severe headaches, itchy and watery eyes, recurring chest pains). *McKinney v. C.M. Products, Inc., et al.* (District Court, White Pine County, Nevada) (filed March 3, 1993).

McKinney also is the plaintiff in a civil rights case against Nevada prison officials regarding his exposure to ETS while incarcerated. On June 18, the U.S. Supreme Court remanded the case to the trial court to give McKinney an opportunity to try to prove his case. See issue 50 of this Report, June 25, 1993.

[14] *Voth*: Second Amended Complaint Filed

On August 10, 1993, plaintiff filed an amended complaint purporting to add products liability claims to his previously-filed civil rights action. Plaintiff's original complaint was filed against Forsyth Tobacco Products, R.J. Reynolds and Brown & Williamson. The amended complaint names two additional cigarette manufacturers, Philip Morris and American, as defendants. Plaintiff seeks \$12 million in actual damages, \$500,000 in non-economic damages, and \$30 million in punitive damages in the amended complaint. Plaintiff also seeks an injunction to ban the sale of cigarettes in Oregon.

Frank Voth, who is incarcerated in the Oregon State Penitentiary, alleges that his civil rights have been violated as a result of his exposure to ETS. He claims that he has "incurred permanent health damage and is at risk of death" as a result of ETS exposure. Defendants in *Voth* are Forsyth Tobacco Products, R.J. Reynolds, Brown & Williamson, Philip Morris and American. *Voth v. Forsyth Tobacco Products, et al.* (U.S. District Court, Oregon) (filed April 27, 1993).

ETS/IAQ LITIGATION NOT INVOLVING
CIGARETTE MANUFACTURERS

ELECTION HEADQUARTERS: DISABILITY
DISCRIMINATION

[15] *Young v. Democratic National Committee* (Federal
Elections Commission) (filed August 1993)

Airline flight attendant Patricia Young, who is one of the named plaintiffs in the *Broin* litigation, has reportedly filed a complaint with the Federal Elections Commission (FEC) alleging that she was denied her right to volunteer for President Clinton's presidential campaign because local campaign officials refused to prohibit smoking in the Dallas campaign headquarters. Claiming that she is handicapped under federal law due to her hypersensitivity to ETS, Young is asking the FEC to deny federal campaign funds to the Democratic National Committee and the Clinton campaign "unless they agree not to discriminate against the handicapped in future elections."

Young apparently did not file the complaint earlier as she did not want to jeopardize Clinton's prospects in the election, but she claims that she began complaining to Democratic campaign officials in September 1992, when she asked that smokers be required to go outside. Officials with the Democratic party reportedly do not recall speaking with Young about the issue. See *Associated Press*, August 25, 1993.

GOVERNMENT BUILDING EXPOSURE

[16] *Crump v. Department of Health and Human
Services*, No. 93-265 (U.S. Supreme Court)
(petition for review filed May 17, 1993)

Plaintiff Thomas A. Crump has filed pro se, a petition for writ of certiorari in the U.S. Supreme Court to challenge lower court decisions dismissing his action to ban smoking in state and local government buildings. Crump's claims allegedly arose out of an incident occurring in the Henrico County Courts Building, Virginia, in November 1991, when he observed someone smoking in a posted nonsmoking area. He allegedly asserted his right to redress violations of "natural and civil rights" under the Preamble and the First, Ninth and Fourteenth Amendments to the U.S. Constitution, and he claimed that his rights had

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been violated by the defendants' failure to protect him from ETS.

In his complaint, Crump (i) sought to ban smoking in the county courts building and in all state buildings; (ii) requested that the court close all cigarette manufacturing plants in Virginia and the U.S.; and (iii) requested that the court provide a smoke-free environment for all people. Defendants in the case are the Department of Health and Human Services, EPA, OSHA, FDA, U.S. Congress, the President of the U.S., the Virginia General Assembly, and the Governor of Virginia.

The district court, in a memorandum opinion, determined that the federal defendants were immune from suit and that the complaint stated no cause of action against them inasmuch as the alleged violation of a state smoking law does not constitute a violation of federal law and cannot be redressed by the federal government. The court observed that it could not enjoin lawful activity and thus determined that it could not enjoin the manufacture and sale of cigarettes. Crump was advised to address his concerns "through political means, such as by educating and enlightening the voting public and their elected representatives."

In a separate opinion, the district court also dismissed the state defendants on the basis of sovereign immunity. The U.S. Court of Appeals for the Fourth Circuit affirmed. *Crump v. U.S. Dept. of Health and Human Services*, 1993 U.S. App. LEXIS 3002 (4th Cir. 1993).

WORKPLACE: COLLECTIVE BARGAINING

- [17] *Department of the Navy, Naval Computer Telecommunications Station, East Machias, Maine and Local 2635, American Federation of Government Employees, AFL-CIO*, 1993 WL 310383 (Federal Service Impasses Panel) (decided August 12, 1993)

A federal arbitration panel has agreed with an employer's proposal that smoking be restricted indoors at a remote facility on the Atlantic coast of Maine. Pursuant to this proposal, smoking will be permitted only in family housing units, bachelor enlisted quarters and a recreation area. The employer had cited the EPA Risk Assessment on ETS to support its position. The panel stated, in this regard, "we favor prohibiting

indoor smoking, given the overwhelming body of scientific evidence cited by the Employer conclusively establishing the health hazards associated with the passive inhalation of second-hand smoke." The employer will, however, be required to provide outdoor smoking areas that provide a measure of protection from the elements.

- [18] *Department of the Army, Army Reserve Personnel Center, St. Louis, Missouri and Local 900, American Federation of Government Employees, AFL-CIO*, 1993 WL 317674 (Federal Service Impasses Panel) (decided August 19, 1993)

A federal arbitration panel has agreed with an employer that smoking will be banned in three of its buildings following the completion of construction and renovation activities. The union and employer had reached a negotiating impasse over the smoking policy, with the union proposing that limited areas in the buildings remain designated smoking areas or, in the alternative, that the employer be required to build an outdoor structure to protect smokers from the elements. The union also requested that smoking breaks in addition to regular breaks be permitted.

Stating that "the health hazards associated with the passive inhalation of second-hand smoke" have been conclusively established by an "overwhelming body of scientific evidence," the panel designated several indoor smoking areas until completion of construction and determined that the outdoor accommodations already offered by the employer were sufficient to protect smokers once the buildings had been declared smoke free. These accommodations consist of an overhang at the entrance to the building and a tent-like structure with plastic walls which could be rolled up or down according to weather conditions. The panel refused to order additional smoking breaks.

- [19] *United States Marine Corps, Washington, D.C. and American Federation of Government Employees*, 1993 WL 310441 (Federal Labor Relations Authority) (decided August 10, 1993)

A federal labor relations panel has remanded this case to an administrative law judge to determine whether a union, in its collective bargaining agreement, waived its right to conduct mid-term negotiations over a workplace smoking policy. The panel had previously found

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that the Marine Corps had committed an unfair labor practice by implementing changes to its workplace smoking policy without bargaining with appropriate union representatives over the proposal and while impasse proceedings were pending.

The panel, finding that the case law upon which it had relied in finding an unfair labor practice was no longer good law, stated, "we will no longer apply the 'clear and unmistakable waiver' analysis that previously had been utilized to address such issues. Instead, we will determine the meaning of the parties' agreement in order to resolve the alleged unfair labor practice."

WORKPLACE: FAIR REPRESENTATION

[20] *John Deere Co., Local 125, United Auto Workers*, 1993 WL 321785 (Office of General Counsel, National Labor Relations Board) (decided July 29, 1993)

General Counsel of the National Labor Relations Board (NLRB) has advised a union that it did not violate its duty of fair representation in refusing to file a grievance on behalf of employees who sought a workplace smoking ban after allegedly experiencing difficulty breathing in spite of restrictions that had been placed on smoking in the warehouse in which they worked. The union and employer had bargained for the restrictions which prohibited smoking where employees work near each other.

In February 1993, one employee set grievance proceedings in motion, alleging that the existing smoking policy was not being enforced and that this was adversely affecting his asthmatic condition. The union gave approval to the proposed grievance. A fellow employee decided to change the nature of the grievance to a request for a total smoking ban after becoming aware of the EPA Risk Assessment on ETS, and the union subsequently withdrew the grievance. Members of the union safety committee attempted to file several other grievances on behalf of those with respiratory problems, and they notified the employer that several employees were disabled due to hypersensitivity to ETS.

The union continued to withdraw the grievances filed by the employees, stating that the existing smoking policy was a reasonable accommodation under the Rehabilitation Act and the Americans with Disabilities Act (ADA).

In the meantime, the union and employer negotiated a complete workplace smoking ban to become effective in 1994. In separate discussions with the employer, the employees who claimed they were disabled contended that a "reasonable accommodation" analysis was inapplicable because there was no business necessity for permitting smoking in the workplace. The employees filed a Rehabilitation Act complaint against the employer and filed charges against the union alleging failure to fairly represent employees and against the employer alleging unlawful acquiescence in the union conduct.

The NLRB General Counsel determined that the union adhered to the negotiated smoking policy and did not discriminate against the employees who were seeking a workplace smoking ban. In this regard, General Counsel states, "The negotiated policy is not discriminatory on its face, and does not clearly violate the ADA." The General Counsel also determined that the employer did not unlawfully acquiesce in the union's failure to represent disabled employees without discrimination.

WORKPLACE: PERSONAL INJURY

[21] *Roos v. Ally and Gargano, Inc.*, 1993 Conn. Super. LEXIS 2142 (Superior Court, Stamford, Connecticut) (decided August 19, 1993)

A Connecticut Superior Court judge has granted an employer's motion for summary judgment in a case involving claims for personal injury and loss of income filed by a former employee who alleged that she was an asthmatic who was made ill and forced to resign due to ETS exposure in the workplace. In so ruling, the court held that an alleged violation of a workplace smoking statute does not constitute an exception to the exclusivity provision of the Workers' Compensation Act where the complaining employee is seeking compensation for work related injuries.

The plaintiff in this case, Patricia S. Roos, attempted to avoid the application of the exclusivity provision by relying upon an intentional misconduct exception, but the court found that she had not alleged intentional misconduct in her complaint. The court also noted that the state's workplace smoking law contains a remedial provision for employees who believe a violation of the statute has occurred. Such employees are authorized to file a written complaint with the labor commissioner who may hold hearings if necessary.

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WORKPLACE: UNION REPRESENTATION

- [22] *AP Green Industries*, 1993 WL 321784 (Office of General Counsel, National Labor Relations Board) (decided July 30, 1993)

In deciding that an employer did not bypass the union and unlawfully deal directly with its employees during "communications luncheons," General Counsel for the National Labor Relations Board acknowledged that a workplace smoking policy is a term and condition of employment. The employer in this case conducted regular luncheon meetings with employees who were permitted to make suggestions and ask questions regarding the company. Individual employees occasionally discussed subjects such as the workplace smoking policy, but the employer would state, when such matters arose, that the issue was contractual and would have to be discussed with the union. General Counsel determined that this response indicated that the employer was not undermining the union's representational status.

PRISONER CASE

- [23] *Gaster v. Campbell*, 1993 U.S. App. LEXIS 22433 (U.S. Court of Appeals, Fourth Circuit) (decided September 2, 1993)

Citing *Helling v. McKinney*, 61 U.S.L.W. 4648 (U.S. 1993), the Fourth Circuit Court of Appeals has determined that a prisoner should be given the opportunity to litigate his pro se claim of cruel and unusual punishment due to ETS exposure. "Although it remains to be seen whether Gaster will be able to meet the subjective and objective elements of *McKinney*," the appellate court states, "his complaint states a cognizable Eighth Amendment claim."

WORKPLACE: IAQ/SICK BUILDING SYNDROME

- [24] *Elliot v. San Joaquin County Public Facilities Financing Corp.*, No. 244 601 (Superior Court, San Joaquin County, California) (filed 1991; complaint amended June 1993)

According to a press report, a trial court hearing was scheduled for September 7, 1993, to consider a defendant's demurrer to the amended complaint filed

by employees of the San Joaquin District Attorney's Office. The employees allege injuries caused by poor workplace IAQ. Defendants in the lawsuit include the building owner, manufacturers and suppliers of products used in remodeling, a pest control firm and unknown Doe defendants.

The employees allege that they are suffering from respiratory ailments, permanent allergies, "chemical low tolerance levels" and emotional distress. Liability is asserted on the basis of negligence, strict liability, implied warranties of fitness and merchantability, express warranty, fraud and negligent misrepresentation. The claim of negligence is reportedly based, among other matters, upon defendants' failure to properly evaluate, test and investigate for toxic substances; provision of inadequate ventilation during remodeling; utilization of materials that were capable of off-gassing formaldehyde and other noxious substances; and failure to warn.

According to liaison counsel for the defendants, a case management order was entered in the case, requiring the plaintiffs to identify the chemicals or components alleged to have caused their injuries. When those substances are identified, the defendants will have the opportunity to respond and produce information pursuant to the order. Discovery as to all issues except causation has apparently been stayed. See *Indoor Pollution Law Report*, August 1993.

LEGAL ISSUES AND DEVELOPMENTS

- [25] *ASH Sends Letter to 50 Largest Corporations*

Action on Smoking and Health (ASH) claims to have sent certified letters to America's 50 largest corporations, warning them that continuing to permit smoking in their workplaces can be "harmful to corporate health" and reportedly results in lawsuits. ASH refers to the brochure distributed by the EPA in July 1993 as "official U.S. Agency guidelines for regulating workplace smoking."

The letter told the companies that while there are no penalties for not following the "guidelines," the courts are likely to look at them as authoritative when considering claims for workers' compensation, unemployment compensation, disability benefits, handicap

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discrimination and other legal actions. Also enclosed with the letters was a summary of the EPA Risk Assessment on ETS.

According to ASH, it hopes the mailing "will help persuade many of these trend-setting businesses to move from systems of separate sections to complete smoking bans." See *ASH Smoking and Health Review*, July-August 1993.

[26] "Passive Smoking Ignites Active Legal Debate," R. Barton Conlin, *Journal of the Massachusetts Academy of Trial Attorneys*, July 1993

Author Roxanne Barton Conlin, former president of ATLA, begins this article by observing that the EPA Risk Assessment on ETS "ignited a series of reports predicting increased litigation." She argues that lawyers should not be responsible for protecting workers from exposure to ETS by bringing lawsuits that will get the attention of their employers. Barton Conlin notes, however, that the legal system may be "our most effective regulator" and reports that litigation has prompted recalls of or improvements to many unsafe products.

The article concludes, "For employers and regulators to default on health and safety, leaving only lawyers to stand with the passive smoking victims and their families against the powerful tobacco industry, would be an outrageous abrogation of responsibility that must not be allowed."

[27] Lawyer Found Guilty of Assaulting Smoker in Restaurant

Maryland attorney Abraham Korotki was reportedly convicted of criminal assault following an attack upon a smoker in a restaurant on May, 15, 1993. Korotki struck the woman on the head when she refused to put out a cigarette at his request and told her to quit smoking while his son tied her belt loop to a chair with kite string. Korotki apparently testified during trial in Dundalk District Court that the incident was merely a friendly prank.

The judge, before pronouncing the guilty verdict, reportedly accused Korotki of "indefensible, crass and offensive" behavior, and he asked, "What gives you the right to invade someone's space without their permission?" Korotki was given one year of probation before

judgment and was fined \$250. The fine was suspended and Korotki was ordered to perform 50 hours of community service.

The woman who was assaulted, Debra Jane Lowenstein, has reportedly filed a \$7 million civil action against Korotki and his son. It is unknown whether the Attorney Grievance Commission of the Maryland Bar Association will take action against Korotki; his license to practice law was suspended for 18 months in 1990 for fee gouging. See *Associated Press*, August 26, 1993.

[28] "Employers' Screening Procedures Under the Americans with Disabilities Act: What's Legal? What's Illegal? What's Debatable," R.B. Fitzpatrick, *ALI-ABA Course of Study, Employment Discrimination and Civil Rights Actions in Federal and State Courts*, June 3, 1993

The author of this article, an attorney with Fitzpatrick & Verstegen in Washington, D.C., discusses issues arising under the Americans with Disabilities Act (ADA), including whether the Act prohibits discrimination against smokers. According to the author, the provision in the ADA which states that it does not preclude an employer from restricting or prohibiting workplace smoking has been interpreted by one commentator as implying that tobacco addiction is a disability under the Act. In this regard, the author observes that state laws prohibiting discrimination in employment against smokers should be consulted by an employer before implementing restrictions on smoking in the workplace.

OTHER DEVELOPMENTS

[29] Burger King Franchisee Bans Smoking

Jan Companies (Janco), which holds franchises on 55 Burger Kings in New England, has reportedly banned smoking in all its restaurants effective on September 1, 1993. Citing the EPA Risk Assessment on ETS in support of the decision, the marketing director was quoted to say, "As the report indicated, children are especially vulnerable to ETS so we decided to . . . eliminate ETS from all our restaurants." The company had already removed cigarette

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